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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

CLARENCE E. BENNETT, ET AL.,
Respondents.

AND

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

DAN R. SANDFORD, JR., ET AL.,
Respondents.

(CONSOLIDATED)

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CONTENTS

APPENDIX A

APPENDIX A

En Banc Opinion

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 81-1418

Clarence E. Bennett, et al,
Appellants,
v.
Kenneth Berg, et al,
Appellees.
* * *
Dan R. Sandford, Jr., et al,
Appellants,
v.
Kenneth Berg, et al,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: January 13, 1983

Filed: July 11, 1983

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, Circuit Judges, HENLEY, Senior Circuit Judge, McMILLIAN, ARNOLD, JOHN R. GIBSON and FAGG, Circuit judges, en banc.

HENLEY, Senior Circuit Judge.

Plaintiffs appeal the dismissal of their complaints[1] for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). We affirm in part and reverse in part.

[1] This case involves two consolidated complaints which are identical except for the named plaintiffs.

Plaintiffs are present and former residents of the John Knox Village retirement community in Lee's Summit, Missouri. Defendants include the not-for-profit corporation John Knox Village; Kenneth Berg, the founder of the Village; various not-for-profit corporations allegedly controlled by Berg; Prudential Life Insurance Co., mortgage lender to the Village; Snyder, Grant & Muehling, the Village's former accountants; two attorneys formerly employed by various defendants; and certain officers and directors of various defendant not-for-profit organizations.

Plaintiffs brought this action alleging that defendants conspired to, and did in fact, defraud them with the result that plaintiffs face the loss of the "life care" which they expected to receive in return for an initial endowment fee plus a monthly service fee. Counts I and II of the complaint assert claims for relief based on the civil remedies provisions of Title IX of the Organized Crime Control Act of 1970, "Racketeer Influenced and Corrupt Organizations," codified at 18 U.S.C. §§ 1961-68 (1976), hereinafter referred to as RICO.[2] Count I charges all defendants except John Knox Village with participating, and conspiring to participate, in a pattern of racketeering through mail fraud. Count II consists of a prayer for equitable relief against John Knox Village based on the factual allegations in Count I.

The district court granted defendants' motions to dismiss the complaint on the grounds that plaintiffs failed to allege the existence of an identifiable "enterprise," and that the equitable relief sought in Count II is not available to a private plaintiff. A panel of this court, for reasons we adopt, affirmed in part and reversed in part the district court's dismissal. *Bennett* v. *Berg*, 685 F.2d 1053 (8th Cir. 1982).[3] Briefly, the panel held that plaintiffs have

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[2] Federal jurisdiction is invoked based on the two RICO counts. The complaint also includes a number of pendent state claims.

[3] For a more detailed statement of the case, see the panel opinion.

standing to assert a claim based on RICO's civil remedies provisions; that plaintiffs have sufficiently alleged the existence of an enterprise distinct from the pattern of racketeering; that, with respect to Count I, plaintiffs have sufficiently alleged the existence of an enterprise distinct from the culpable person;[4] that plaintiffs have alleged fraud with sufficient particularity except for certain specified allegations, 685 F.2d at 1062 nn. 14 and 15; and that involvement with organized crime, as that term is commonly understood, is not a necessary element of a RICO claim.[5]

While we adhere to the views expressed by the panel regarding the dismissal of the complaint, we offer the following observations in the interest of aiding the district court and the parties on remand. As noted by the panel, 685 F.2d at 1058, 1061, n. 10, the complaint, which was described by the district court as a "long, rambling discourse," was poorly pleaded and raises serious doubts as to whether plaintiffs will succeed in establishing the requisite elements of their RICO claim against a number of defendants, particularly the following: Prudential Life Insurance Co.; Snyder, Grant & Muehling; Evangelical Christian Social Services; John Knox Communities, Inc.; National Village Church Center; National Gerimedical Hospital and Gerontology Center; Westminster Gerontology Foundation, Inc.; Jess Garrison; Paul Edwards; Elson Herndon; Mike Swingle; and Irma Waddell. In light of these and other statements by the panel, we are confident that on remand plaintiffs may wish to amend their pleadings. *See* Fed.R.Civ.P. 15.

One of the most immediate concerns we have with the allegations against the defendants just mentioned is the questionable

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[4] With respect to Count II, the panel concluded that plaintiffs have failed to allege an enterprise apart from John Knox Village, the only defendant named in Count II.

[5] Because of the panel's conclusion on Count II, see note 4 *supra*, the panel found it unnecessary to address the question of whether equitable relief is available to private plaintiffs under 18 U.S.C. § 1964.

factual basis underlying the claim that each of them participated in the conduct of the affairs of an enterprise in violation of 18 U.S.C. § 1962(c). As the panel noted in footnote 10 of its opinion, RICO forbids persons from conducting the affairs of an enterprise through a pattern of engaging in the predicate crimes. This statement was made in the course of panel consideration of the question whether there were appropriate allegations of "enterprise."

In somewhat different context, the en banc court is concerned that the complaint may be deficient as failing to allege adequately the requisite *degree* of participation in or conduct of the affairs of an enterprise on the part of each named defendant. Mere participation in the predicate offenses listed in RICO, even in conjunction with a RICO enterprise, may be insufficient to support a RICO cause of action. A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself. *Cf. United States* v. *Mandel*, 591 F.2d 1347, 1375-76 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). However, in light of the fact that this deficiency may not have been directly raised appropriately both in the district court and in this court, and in light of the nature of the complaint and virtual certainty of its amendment, we decline to affirm the dismissal of the RICO allegations in Count I as to any defendant on this ground. We do affirm the statement of the panel contained in its footnote 10 and again observe that it is unlawful for "any person employed by or associated with any enterprise... to conduct or participate... in the conduct of such enterprise's affairs through a pattern of racketeering activity[.]" 18 U.S.C. § 1962(c). And, as we said in *United States* v. *Lemm*, 680 F.2d 1193, 1203 (8th Cir. 1982), "[A] RICO conspiracy charge alleges agreement to participate in conducting the affairs of an enterprise through the commission of... predicate acts."

In adhering to the panel's conclusion that plaintiffs' complaint should not be dismissed on 12(b)(6) motions, for emphasis we repeat the panel's suggestion that it may be appropriate for appellees to tender and the district court to consider a Rule 12(e) motion for more definite statement, 685 F.2d at 1061 n. 10. Any such motion may reach any or all of the requisite elements of the RICO claims against any of the defendants.

Indeed, nothing in this opinion should be construed as discouraging the district court on remand from freely considering in the context of appropriate motions questions whether any or all of the defendants should remain in the case until its conclusion on the merits. Certainly, in a complex case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed. *Associated General Contractors of California, Inc.* v . *California State Council of Carpenters and Carpenters 46 Northern Counties Conference Board,* 103 S.Ct. 897 (1983).

In sum, the dismissal of Count I and the pendent state claims is reversed; the dismissal of Count II is affirmed; and the case is remanded to the district court for further proceedings in accordance with this opinion.

McMILLIAN, Circuit Judge, concurring in part and dissenting in part.

I concur in the reversal of the district court's dismissal of Count I and the pendent state claims. I agree that plaintiffs sufficiently alleged the existence of an enterprise distinct from the pattern of racketeering and alleged fraud with sufficient particularity except as noted in the panel opinion.

I do not agree, however, that plaintiffs failed to allege in Count II the existence of an "enterprise" distinct from the defendant "person" who conducted or associated with that enterprise for purposes of racketeering. Although careful

amendment[1] of the pleadings on remand as suggested by the panel opinion, 685 F.2d at 1061–62, could circumvent the person-enterprise identity problem, I would reach that question and hold that the corporate defendant, John Knox Village, can simultaneously be named as the enterprise through which the defendant or defendants conducted or participated in a pattern of racketeering. *Cf. United States* v. *Hartley*, 678 F.2d 961, 986-90 (11th Cir. 1982) (criminal RICO action), *cert. denied*, 103 S.Ct. 815 (1983); *see* Blakey, *The Rico Civil Fraud Action in Context: Reflections on Bennett* v. *Berg*, 58 Notre Dame L.Rev. 237, 324-25 & n. 181 (1982). *Contra Fields* v. *National Republic Bank*, 546 F.Supp. 123, 124 & n. 5 (N.D.Ill.1982) (civil RICO action); *cf. United States* v. *Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982) (criminal RICO action), *cert. denied*, 103 S.Ct. 729 (1983). Accordingly, I dissent from that part of the majority en banc opinion which concludes that John Knox Village cannot simultaneously be both a person and an enterprise under RICO.

I would also reach the question whether equitable relief is available to private parties under RICO, a question left undecided by the majority en banc opinion, and answer that question affirmatively. As noted by Professor Blakey,

> [S]ection 1964(a) is a general grant of equitable power. It is not limited on its face or in its legislative history. Section 1964(b) grants the government authority to seek relief, an authority that it was necessary to set out lest old learning be

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[1] The panel opinion suggested that plaintiffs in Count II may have intended to place the residential community in the role of the requisite RICO enterprise and noted that the "residential community, so perceived, would arguably be an 'association in fact' for purposes of RICO. 18 U.S.C. § 1961(4)." 695 F.2d at 1061; *cf. United States* v. *Hartley*, 678 F.2d 961, 989 (11th Cir. 1982) (criminal RICO action; problem of identity of person and enterprise would never have surfaced if the government had charged the defendants collectively as an "association in fact" and charged the corporation singly as the enterprise), *cert. denied*, 103 S.Ct. 815 (1983).

> used to circumscribe the new governmental power to seek equitable relief. Nothing in section 1964(b) speaks in negative terms about an authorization for private parties to seek similar relief. Indeed, the governmental suits are to be brought on behalf of private parties. No satisfactory explanation can be offered as to why Congress would have precluded victims from seeking help themselves. Section 1964(c), moreover, says "sue and" and not "sue to." The contrary argument would have to suggest that by adding the right to secure treble damage relief to the general right to sue Congress somehow manifested an intention to subtract the right to obtain other forms of relief. How addition might be converted with subtraction in a remedial statute that must be liberally construed strains even the legal imagination. Section 1964 ought to be read as authorizing both governmental and private suits to obtain equitable relief. To the degree that any ambiguity might be thought to exist in the choice of language, the liberal construction clause and the remedial purpose of the statute come down on the side of finding private suits to be authorized and that full relief can be granted. No satisfactory rationale can be offered, in short, to explain why a court ought to feel itself circumscribed in doing full justice for a victim under RICO.

58 Notre Dame L.Rev. at 331-32 (footnote omitted); *see* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies*, 53 Temple L.Q. 1009, 1014, 1038 nn. 132-33 (1980).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

APPENDIX B

Panel Opinion

CLARENCE E. BENNETT, ET AL.,

Appellants,

v.

KENNETH BERG, ET AL.,

Appellees.

DAN R. SANDFORD, JR., ET AL.,

Appellants,

v.

KENNETH BERG, ET AL.,

Appellees.

No. 81-1418.

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

Submitted: Nov. 10, 1981*

Filed: Aug. 11, 1982

Before HENLEY** and ARNOLD, Circuit Judges, and NICHOL,*** Senior District Judge.

HENLEY, Senior Circuit Judge.

This appeal arises upon the district court's granting of defendants' motion to dismiss for failure to state a claim. Fed. R.

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* As indicated, this appeal was submitted November 10, 1981. However, it was held in abeyance pending decision in *United States* v. *Bledsoe*, 674 F.2d 647 (8th Cir. 1982), and *United States* v. *Lemm*, Nos. 80-1836, and 80-1837 (8th Cir. June 15, 1982).

** Judge Henley assumed senior status on June 1, 1982.

*** The Honorable Fred J. Nichol, Senior District Judge, District of South Dakota, sitting by designation.

Civ. P. 12(b)(6). The case involves two consolidated complaints[1] in which plaintiffs-appellants seek, *inter alia*, treble damages and equitable relief under the civil remedies provisions of the title popularly known as RICO. Title IX of the Organized Crime Control Act of 1970, "Racketeer Influenced and Corrupt Organizations," Pub. L. No. 91-452, §§ 901-904, 84 Stat. 992, 941-48, codified at 18 U.S.C. §§ 1961-68 (1976). Appellants' basic allegation is that their retirement community, known as John Knox Village, has been subject to financial mismanagement and self-dealing such that they are in danger of losing the "life care" which they were promised.

The district court held that appellants' complaint was subject to dismissal because it failed to allege the existence of an identifiable "enterprise" within the meaning of RICO, and because the equitable relief sought by appellants is not available to a private plaintiff. Federal jurisdiction was predicated entirely upon the RICO Act. Dismissal of the RICO counts therefore resulted in dismissal of pendent state claims.

We reverse in part and affirm in part the district court's dismissal.

I. BACKGROUND

Plaintiffs-appellants are present and former residents of the John Knox Village retirement community in Lee's Summit, Missouri. The facility is owned and operated by a not-for-profit corporation of the same name organized under the general corporation law of Missouri.[2] The Village is exempt from federal taxation pursuant to 26 U.S.C. § 501(c)(4), and is exempt from Missouri state and local taxation by virtue of its not-for-profit status.

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[1] The complaints are identical except for the named plaintiffs.

[2] Hereinafter, we refer to the incorporated entity which owns and operates the facility as "John Knox Village," "JKV", or "the Village." We distinguish the retirement facility and its residents as "the community" or "the facility."

The residential community consists of approximately 2,500 residents who occupy units in the facility pursuant to Occupancy Agreement contracts. Under the terms of the occupancy agreements,[3] payment of an initial lump sum, or "Entrance Endowment," entitles a resident to occupy a specific apartment for life. Appellants allege[4] that the endowment fee paid by various plaintiffs ranged in amount from $9,000.00 to more than $50,000.00.

In addition to the entrance endowment, the occupancy agreements call for the payment of a "monthly lodging and/or service charge ... in such amounts as determined by the Board of Directors of the Village." The agreements state that "the Village proposes to provide" some fifty-one services and facilities out of the monthly charges, including tray and diet service, building and grounds maintenance, scheduled transportation service, laundry service and various medical services.

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[3] Plaintiffs' complaints did not attach or incorporate by reference an occupancy agreement. An Agreement, however, has been provided as an appendix to the brief on appeal of defendant-appellee Snyder, Grant, and Muehlig. An agreement is also contained in the record on appeal as an attachment to defendants' memorandum in support of their motions to dismiss, submitted to the district court.

Consideration of the occupancy agreement as a matter outside the pleadings would ordinarily convert a Rule 12(b)(6) motion into a motion for summary judgment. See Fed. R. Civ. P. 12(b)(6) and 56; *Sherwood Medical Industries, Inc.* v. *Deknatel, Inc.*, 512 F.2d 724, 725 n.2 (8th Cir. 1975). The district court, however, expressly noted that no motions for summary judgment were filed. All parties and the district court referred freely to the occupancy agreements, apparently assuming that such extrapleading material could be utilized without automatic conversion of the Rule 12(b) motions into proceedings for summary judgment.

In these circumstances, the motions to dismiss in district court should probably have been converted into speaking motions for summary judgment. However, any error in not treating the motions as motions for summary judgment is harmless.

[4] For purposes of reviewing the granting of a Rule 12(b)(6) motion to dismiss, we accept appellants' factual allegations as true. *Loge* v. *United States*, 662 F.2d 1268, 1270 (8th Cir. 1981), *cert. denied*, 102 S.Ct. 2009 (1982).

Appellants allege that the Village is on the verge of bankruptcy, that services have markedly deteriorated, and that they face the loss of the "life care" which they expected and would have received but for fraud both in the inducement of residents to live in the community and in the operation of the Village. Their complaints in eleven counts stated causes of action for common law fraud under state law; violation of Missouri's Merchandising Practices Act, Mo. Rev. Stat. § 407.010 *et seq.* (1978); breach of fiduciary duty; and RICO violations. Only the RICO counts are directly at issue in this appeal.

The complaints include two RICO counts. In Count I, all defendants except John Knox Village are charged with participation in a pattern of racketeering through numerous acts of mail fraud, and conspiracy to engage in such a course of conduct, in violation of RICO provisions codified at 18 U.S.C. 1961(5), 1962(a), (b), (c), and (d). Count II incorporates the factual allegations of County I against John Knox Village with a prayer for equitable relief in the form of reorganization of the Village.

The essence of the scheme alleged is that various defendants fraudulently promoted the retirement community with materially false statements as to the Village's financial soundness and the promise of affordable "life care." Defendants are further alleged to have breached their fiduciary duty in operating the Village through a pattern of self-dealing. Finally, various defendants, including the Village's mortgage lender and former accountants, are charged with conspiracy to conceal the fraudulent promotion and operation of the Village.

The named defendants are the not-for-profit corporation John Knox Village; the founder of the Village, Kenneth Berg (hereinafter "Berg"); various not-for-profit corporations allegedly controlled by Berg; the mortgage lender to the Village, The Prudential Life Insurance Company of America (hereinafter "Prudential"); the Village's former accountants, Snyder, Grant

& Muehling (hereinafter "SG&M"); two former attorneys employed by various defendants; and various officers and directors of the Village and other not-for-profit organizations named in the complaint.

On March 11, 1981 the district court entered an order granting various defendants' motions to dismiss, followed by an unpublished memorandum opinion, order and judgment dismissing the complaints in both actions. The court held that the complaints failed to allege an "enterprise" within the meaning of RICO, and that the relief sought in Count II, a reorganization of defendant John Knox Village pursuant to 18 U.S.C. 1964(a), was not available to private plaintiffs under the RICO Act.

On appeal, appellees renew their contention that (1) appellants failed to allege such "injury to [their] business or property" as is cognizable under RICO, 18 U.S.C. § 1964(c); (2) appellants failed to allege a RICO "enterprise" separate from the "pattern of racketeering"; (3) appellants failed to allege a TICO "enterprise" separate from the "person" or persons who may be culpable under RICO; (4) appellants failed to allege a "pattern of racketeering activity"; (5) appellants failed to allege that defendants "invested" racketeering proceeds in an enterprise, "acquired an interest in" an enterprise through racketeering activity, or "associated with" an enterprise to conduct the enterprise's affairs through a pattern of racketeering; (6) appellants failed to allege that organized crime was involved in their injury; and (7) the equitable relief requested is not available to private plaintiffs.

This litany of grounds for affirmance includes a number of issues of first impression in the Circuit Courts of Appeals. In reversing, we stress that today's decision is rendered on the pleadings without the benefit of a full factual record. Moreover, we are bound by a stringent standard in reviewing a Rule 12(b)(6) dismissal. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the

plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). A complaint must be viewed in the light most favorable to the plaintiff and should not be dismissed merely because the court doubts that a plaintiff will be able to prove all of the necessary factual allegations. "Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief [citations omitted]." *Fusco* v. *Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982), quoting *Jackson Sawmill Co.* v. *United States*, 580 F. 2d 302, 306 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979).

Pleadings should be construed to do substantial justice. Fed. Civ. P. 8(f). Specificity sufficient to supply fair notice of the nature of the action will withstand a motion under Rule 12(b)(6). *Bramlet* v. *Wilson*, 495 F. 2d 714, 716 (8th Cir. 1974); 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1216 at 120-121 (1969).

We are uncertain whether the facts developed at trial will sustain a cause of action under RICO. We are compelled under these standards, however, to reverse in part the district court's dismissal.

II. DISCUSSION.

A. Standing.

Appellees JKV, Prudential, and SG&M argue as a preliminary matter that appellants failed to allege the kind of injury which supports standing to bring a civil RICO suit. RICO provides that a civil action for treble damages may be brought by "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c).

Appellants' complaints alleged several forms of monetary loss. Appellants' entrance endowment payments are alleged to be

worth 10% of what appellants bargained for, due to appellees' alleged conversion to their own use of funds which were deposited in trust for "life care." Monthly service charges are also alleged to be higher than expected due to appellees' unlawful conduct.

Appellees respond that the complaints do not allege a RICO injury for two reasons. First, the complaints are said to assert no breach of contract. Thus they allegedly do not state any injury whatsoever. Alternatively, any injury stated in the complaints allegedly is not an "injury to property" recognizable under the RICO Act. RICO is said to require competitive injury.

We are not convinced. Even if breach of contract is not directly and clearly stated in the complaints, this is irrelevant. Appellants' basic contention is that the value of their occupancy agreements was misrepresented *ab initio*, and that appellees conduct has further lessened the value of their contracts. The essence of this alleged injury is not so much that contractual terms have been breached, but that the value of the contracts is different than appellants were led to expect through extracontractual statements and promises. The allegation sounds as one of injury flowing from fraud rather than breach of contract. Appellants claim essentially to have been deprived of the benefit of their bargain.

Appellees' second argument is somewhat more troublesome. They contend that even if appellants have alleged an injury, they have not alleged an "injury to property" within the meaning of Section 1964(c). Section 1964(c) provides a private cause of action modelled on the antitrust laws. S. Rep. No. 617, 91st Cong., 1st Sess., 80-82, 125, 160 (1969) (hereinafter cited as S. Rep. No. 617); 115 Cong. Rec. 6993 (1969) (statement of Sen. Hruska); *id.* at 39,907 (statement of Sen. McClellan); 116 *id.* at 585 (1970) (synopsis of S. 30, 91st Cong., 1st Sess. (1969)); *id.* at 35,916 (statement of Rep. Celler); *id.* at 35,201 (statement of

Rep. McCulloch); *id.* at 36,296 (statement of Sen. Dole). Appellees argue from this fact that the "injury to property" alleged under Section 1964(c) must be an injury to competitive or commercial interests.

This argument has found favor with some courts. *Van Schaick* v. *Church of Scientology*, Civ. Action No. 79-2491-G (D. Mass. March 26, 1982) (requiring commercial harm though not competitive injury); *North Barrington Development, Inc.* v. *Fanslow*, ... F. 2d ....., No. 80-C-2644 (N.D. Ill. Oct. 9, 1980) (requiring competitive injury).

We acknowledge that RICO was intended in part to combat the threat posed by racketeer influence in the free market system. H.R. Rep. No. 1549, 91st Cong., 2d Sess. 57, *reprinted in* [1970] U.S. Code Cong. & Ad. News 4007, 4033 (hereinafter cited as H.R. Rep. No. 1549); S. Rep. No. 617; *United States* v. *Turkette*, 452 U.S. 576, 291 & nn. 13, 14, (1981) (and citations to legislative history therein). This does not mean, however, that RICO should be viewed as an extension of antitrust laws in all respects. Different policies underlie the two bodies of law. To ruin an antitrust defendant, usually a legitimate businessman, would generally lessen competition and increase concentration in a particular industry. RICO, on the other hand, is concerned "strik[e] . . . a mortal blow against the property interests of organized crime." 116 Cong. Rec. 602 (1970) (statement of Sen. Hruska). In a RICO context, there are few countervailing reasons to lessen the impact of RICO remedies by importing the limitations on standing which apply in antitrust law. In other words, although RICO borrowed the tools of antitrust law to combat organized criminal activity, we do not believe the RICO Act was limited to the antitrust goal of preventing interference with free trade. Congress did not see the objectives of RICO and the antitrust laws as coterminous. *See* S. Rep. No. 617 at 81–82; 115 Cong. Rec. 6993 (statement of Sen. Hruska); *id.* at 9567

(statement of Sen. McClellan); 116 *id.* at 607 (1970) (statement of Sen. Byrd); *id.* at 35,-193 (statement of Rep. Poff).

We conclude that an allegation of commercial or competitive injury is not required by the RICO Act. *Prudential Lines, Inc.* v. *McKeon,* No. 80 Civ. 5853 (S.D.N.Y. April 21, 1982); *Landmark Savings & Loan* v. *Rhoades,* 527 F. Supp. 206, 208 (E.D. Mich. 1981); *Hellenic Lines, Ltd.* v. *O'Hearn,* 523 F. Supp. 244, 248 (S.D.N.Y. 1981) (RICO does not countenance racketeering activity merely because it is done uniformly among competing concerns); see also Note, Civil RICO; *The Temptation and Impropriety of Judicial Restrictions,* 95 Harv. L. Rev. 1101, 1109-1114 (1982) (hereinafter cited as Note, Civil RICO); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations* (RICO): *Basic Concepts-Criminal and Civil Remedies,* 53 Temple L.Q. 1009, 1040-1043 (1980) (hereinafter cited as Blakey & Gettings, Basic Concepts); Seiling, Standing Rules and the RICO Treble Damage Action, 1 Materials on RICO 533-73 (R. Blakey ed. 1980); but see *Comment, Reading the "Enterprise" Element Back into RICO:* Section 1962 and 1964(c)," 76 Northwestern L. Rev. 100, 125-26 (1981) (private damage suit under RICO may be brought only where there is competitive injury resulting from an "enterprise's" distinct involvement in the racketeering activity) (hereinafter cited as *Comment, Reading the "Enterprise" Element Back into RICO).*[5]

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[5] Appellees' final argument on the issue of standing involves causation. They contend that appellants have failed to allege injury "by reason of a violation of Section 1962," as is required by the facial terms of 18 U.S.C. § 1964(c).

This contention reiterates in new guise the argument that no "enterprise" is alleged in the complaints. Appellees essentially contend that any injury discoverable in the complaints is attributable only to individual acts of mail or wire fraud, rather than a pattern of racketeering conducted through an enterprise. *Compare Landmark Savings & Loan* v. *Rhoades,* 527 F. Supp. 206, 208-09 (E.D. Mich. 1981). We conclude to the contrary that Count I adequately alleges

B. "Enterprise" Distinct From the "Pattern of Racketeering."

Turning to the substantive elements of a RICO claim, appellees next contend that the complaints fail to allege the existence of an enterprise distinct from the alleged pattern of racketeering. This contention, and several others that follow, requires attention to the complex syntax of the RICO statute, which appellants have been all too inclined to ignore.

The RICO Act makes it unlawful for any person to conduct the affairs of an "enterprise"[6] through a pattern of racketeering activity.[7] 18 U.S.C. § 1962(c).[8] Significantly, the statute forbids the predicate acts of racketeering only insofar as an "enterprise" is involved. By requiring proof of an "enterprise," RICO requires proof of a fact other than the facts required to prove the predicate acts of racketeering. *United States* v. *Anderson*, 626 F. 2d 1358, 1367 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981). RICO is not a recidivist statute with enhances penalties for acts of racketeering that are elsewhere proscribed in the criminal code. *Id.* at 1368 n.17 "The . . . enterprise at all times remains a separate element which must be proved[.]" *United*

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the conduct of the affairs of an enterprise through a pattern of racketeering. See Section B, infra.

[6] An "enterprise" is defined by RICO to include any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]

[7] Under RICO, a pattern of racketeering activity requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.] 18 U.S.C. § 1961(5).

[8] We refer to the substantive prohibitions of Section 1962(c). This is the statutory section under which appellants state their strongest claim. Appellants also allege violations of 18 U.S.C. § 1962(a) and (b). Because we conclude that appellants have stated a claim under Section 1962(c), we do not reach the question whether claims may also be stated under subsections (a) and (b).

States v. *Turkette*, 452 U.S. at 583; *United States* v. *Anderson*, 626 F. 2d 1538.

In the present case, the district court assumed that the enterprise alleged in the complaint, if any, is the corporate entity John Knox Village. The court noted that the complaint portrayed the Village as "pervasively fraudulent." In light of this fact, the court concluded that the Village was not alleged to have an existence apart from the acts of racketeering.

We disagree, although our finding of a RICO enterprise is circumscribed as to Count II for the reasons discussed in Section C.

The complaint alleges and appellees themselves stress that John Knox Village provides numerous legitimate services. As an entity providing such services, and as an incorporated body under the laws of the State of Missouri, the John Knox Village corporation has an ascertainable structure apart from any predicate acts of mail fraud. As we held in *Anderson* and as the Supreme Court noted in *Turkette*, an enterprise may be said to exist where such separateness from the acts of racketeering can be found. Discrete existence, rather than the legality or illegality of the enterprise's activities or goals, is the test. *United States* v. *Turkette*, 452 U.S. at 585; *United States* v. *Anderson*, 626 F. 2d at 1372 ("[W]e do not rest our holding on the word "legitimate" but rather on the need for a discrete economic association existing separately from the racketeering activity.").

An enterprise is particularly likely to be found where, as here, the enterprise alleged is a legal entity rather than an "associational enterprise."[9] Legal entities are garden-variety "enterprises" which generally pose no problem of separateness from

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[9] The RICO Act encompasses two kinds of enterprises: legal entities, and "associations in fact." *United States* v. *Turkette*, 452 U.S. 576, 581-82 (1981). Where a legal entity is alleged as the RICO enterprise, this entity is likely to be clearly distinct from the acts of racketeering. E.g., *United States* v. *Bledsoe*, 674 F. 2d 647, 660

the predicate acts. E.g., *United States* v. *Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied sub nom. McGowan* v. *United States* and *Swiderski* v. *United States*, 441 U.S. 933 (1979) (legitimate restaurant serving as front for narcotics trafficking); *United States* v. *Brown*, 583 F.2d 659 (3d Cir. 1978), *cert. denied sub nom. Greenblatt* v. *United States*, 440 U.S. 909, (1979) (auto dealership); *United States* v. *Weatherspoon*, 581 F.2d 595 (7th Cir. 1978) (beauty college); *United States* v. *Forsythe*, 560 F.2d 1127 (3d Cir. 1977) (bail bond agency); *United States* v. *Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105, 95 S. Ct. 775, 42 L. Ed.2d 801 (1975) (foreign hotel and gambling casino).

We conclude that John Knox Village appropriately is named as an enterprise in the complaints for purposes of stating a RICO claim. We do not presently decide whether the various not-for-profit corporations named as an enterprise in the complaints for purposes of stating a RICO claim. We do not presently decide whether the various not-for-profit corporations named in the complaint are also "enterprises" within RICO. We further do not decide whether Kenneth Berg, founder of the Village, or other individual defendants may be enterprises. See 18 U.S.C. § 1961(4) (enterprise includes "any individual"); *United States* v. *Elliott*, 571 F.2d 880, 898 n. 18 (5th Cir.), *cert. denied sub nom. Delph* v. *United States*, 439 U.S. 953 and *Hawkins* v. *United States*, 439 U.S. 953 (1978); *United States* v. *Hawkins*, 516 F. Supp. 1204, 1206 (M.D. Ga. 1981) (single individual may be an enterprise).[10]

(8th Cir. 1982) (co-op, as legal entity, would clearly qualify as enterprise); *United States* v. *Anderson*, 626 F. 2d 1358, 1365 & n. 10 (8th Cir. 1980), cert. denied, 450 U.S. 912, 101 S. Ct. 1351, 67 L. Ed. 2d 336 (1981) (County would necessarily constitute an "enterprise" apart from acts of racketeering, but association in fact of county judges with another for purposes of fraud was more problematic).

[10] In light of appellants' arguments on appeal that all of these entities are RICO enterprises, it may be appropriate for appellees to tender

C. "Enterprise" Distinct From the Culpable "Person."

The RICO Act proscribes conduct in which one party, the "person" subject to the statute, acts upon an entity, the "enterprise," in such a manner that the enterprise's affairs are conducted through a pattern of racketeering.[11] Appellee Prudential separately argues that an "enterprise" was not alleged apart from the "person" who "associated with" an enterprise for purposes of racketeering. We agree as to Count II of the complaints.

Count II is marked by a realignment of the defendant parties. In Count I, appellants seek treble damage relief from all defendants except for John Knox Village, leaving the Village in the role of the "enterprise" affected by the other defendants' allegedly illegal acts. In Count II, equitable relief is sought from JKV. Accordingly, this count places the Village in the role of the "person" responsible for conducting the affairs of an enterprise

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and the district court to consider a Rule 12(e) motion for more definite statement as to the enterprise element.

In the interest of aiding the district court and parties on remand, we offer the suggestion that any amended pleadings should reflect careful attention to the precise language of the RICO Act. Both Count I and Count II are now poorly pleaded. In each count, the defendants are accused of "engag[ing] in 'a pattern of racketeering activity' " in violation of the RICO Act. See paragraphs 82, 85. This statement, taken in isolation, simply accuses the defendants of engaging in the predicate crimes. This is not precisely what the RICO Act forbids. RICO forbids persons from conducting the affairs of an enterprise through a pattern of engaging in the predicate crimes. 18 U.S.C. § 1962(c). *Compare United States* v. *Anderson*, 626 F. 2d at 1362 (quoting indictment which alleged that defendants were persons associated with a named enterprise for purposes of conducting the enterprise's affairs through a pattern of racketeering).

We nevertheless reverse the dismissal of County I because, elsewhere in that count, it is apparant that at least JKV is alleged to be an enterprise.

[11] Section 1962(c) specifically makes it unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity[.] 18 U.S.C. § 1962(c).

through a pattern of racketeering activity. In this formulation, appellants may intend to place the residential community in the role of the RICO "enterprise." The residential community, so perceived, would arguably be an "association in fact" for purposes of RICO. 18 U.S.C. § 1961(4). This allegation, however, has not been clearly set forth. For this reason, we conclude that the RICO claim as stated in Count II against John Knox Village cannot stand. *Van Schaick* v. *Church of Scientology*, Civ. No. 79-2491-G (D. Mass. March 26, 1982). *Compare United States* v. *Hartley*, 678 F.2d 961 (11th Cir. June 17, 1982), reaching a somewhat different result in unique context in a criminal case.

We suggest that on remand appellants should be permitted to amend their complaint, if indeed they fairly may, so as to include some of what is now in Count II, but containing at least an appropraite "enterprise" allegation. Rule 15(a) declares that leave to amend "shall be freely given when justice so requires," and this mandate is to be heeded. See generally 3 J. Moore, *Moore's Federal Practice*, ¶¶ 15.08, 15.10 (1982); *Asay* v. *Hallmark Cards, Inc.*, 594 F.2d 692, 695-96 (8th Cir. 1979). The pleading rules have been interpreted in accord with the principle that the purpose of pleading is to facilitate a proper decision on the merits. *Id.* at 695.

D. Pattern of Racketeering.

Appellees next contend that the complaints fail to allege a "pattern of racketeering." Although "multiple incidents" of mail and wire fraud are alleged, and although racketeering activity includes mail and wire fraud, 18 U.S.C. § 1961(1), the complaints are said to lack the specificity required for pleadings of fraud under Fed. Rules Civ. Proc. 9(b). We find some merit in this argument.

Rule 9(b)[12] requires that "the circumstances constituting fraud . . . be stated with particularity." "Circumstances" include

[12] Fed. R. Civ. P. 9(b) provides: Fraud, Mistake, Condition of Mind.

such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby. See generally 2A J. Moore & J. Lucas, *Moore's Federal Practice*, ¶ 9.03 at 9-18 — 9-24 (1982).

The complaints state the time, place and content of only some of the defendants' alleged misrepresentations.[13] The location of other allegedly false statements is said to be a "pamphlet," "promotional material," or "a typical life-care contract."[14] These allegations are not sufficiently particular to satisfy Rule 9(b). The complaints also fail to attribute certain false statements to identified defendants. Instead "various other defendants"[15] are alleged to be responsible for the statements. These allegations utterly fail to apprise defendants of the claims against them and the acts relied upon as constituting the fraud charged. See 5 C. Wright & A. Miller, *Federal Practice and Procedure*, 1297 at 404 (1969); *Felton v. Walston & Co.*, 508 F.2d 577, 581 (2d Cir. 1974).

We hold that on remand allegations which fail in particularity, see nn. 14, 15, should be struck without prejudice. Insofar as some paragraphs contain allegations against both identified and unidentified defendants, these paragraphs are otherwise specific in stating the time, place and content of the misrepresentations.

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition or mind or a person may be averred generally.

[13] We refer to paragraphs 40, 42, 43.1, 43.2, 46, 67(a), 67(b)(c)(d), 68 and 70, which identify the time, place, and contents of the alleged misrepresentations with particularity. Paragraphs 54, 57, 58, 59 and 60 are also sufficiently specific to state a claim of fraudulent concealment.

[14] See paragraphs 38, 41, 43, 66(d).

[15] See paragraphs 40, 44, 46, 47, 66(d), 67, 68.

Appellees JKV and Prudential also argue that a pattern of racketeering has not been alleged because no allegations of wire or mail fraud are made. This argument ignores numerous allegations of particular false statements. See n. 13, supra. Use of the mails and wire fraud is also alleged.[16]

In sum, we conclude that a pattern of racketeering was alleged, and that fraud was alleged with sufficient particularity except for the allegations identified in nn. 14-15.

E. Involvement of Organized Crime.

Appellee SG&M finally contends that a RICO complaint will lie only where the involvement of organized crime is alleged. This argument has found some degree of support, *Waterman Steamship Corp.* v. *Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981); *Adair* v. *Hunt International Resources Corp.*, 526 F. Supp. 736, 746-78 (N.D. Ill. 1981); *Barr* v. *WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975), from courts which may have been swayed by Congress's evident concern with organized crime in the passage of RICO. See *United States* v. *Turkette*, 452 U.S. at 588-93 & nn. 11, 12, 13, 14, 101 S. Ct. at 2531-33 & nn. 11, 12, 13, 14 (and legislative history cited therein); H.R. Rep. No. 1549, reprinted in [1970] U.S. Code Cong. & Ad. News 4007; S. Rep. No. 617; *see also Comment, Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. Pa. L. Rev. 192, 205 (1975).

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[16] Finally, appellees SG&M and Prudential argue that the complaint does not allege the element of a "RICO relationship" between themselves and an enterprise. In other words, these defendants allegedly did not invest racketeering proceeds in, acquire control of, or associate with an enterprise. 18 U.S.C. § 1962(a), (b), (c).

The contention is without merit. These defendants were the mortgage lender and accountant to the Village. They were "associated with" an enterprise.

We are convinced that the better reasoned approach is one which rejects any attempt to interpret RICO as creating a status *offense* aimed only at organized crime in any colloquial sense of that phrase. The legislative history of the Act suggests that RICO is aimed more broadly at organized criminal activity as well. 116 Cong. Rec. 35,344 (1970) (statement of Rep. Poff) (Organized crime "serve[s] simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.") In fact, a restriction of the statute's applicability to organized crime, defined as a specific group of individuals, appeared constitutionally suspect to the bill's sponsor. *Id.* at 35,204 (statement of Rep. Poff). When Representative Biaggi proposed an amendment that would have specifically criminalized membership in the Mafia or La Cosa Nostra, Representative Celler objected that such terms were "imprecise, uncertain and unclear" and that mere membership in an organization should not be punished. *Id.* at 35,343-44 (statement of Rep. Celler, citing *Robinson* v. *California*, 370 U.S. 660 (1962); *Scales* v. *United States*, 367 U.S. 203 (1961); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939).

We join an increasing number of courts and commentators in concluding that RICO suits are not limited to contexts in which a tie to organized crime is alleged. *United States* v. *Aleman*, 609 F.2d 298, 303-04 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States* v. *Campanale*, 518 F.2d 352, 363-64 (9th Cir. 1975), *cert. denied sub nom. Matthews* v. *United States*, 423 U.S. 1050 (1976); *Hellenic Lines, Ltd.* v. *O'Hearn*, 523 F. Supp. at 247-48; *Engl* v. *Berg*, 511 F. Supp. 1146, 1155 (E.D. Pa. 1981); *Parnes* v. *Heinhold Commodities*, 487 F. Supp. 645, 646 (N.D. Ill. 1980); *United States* v. *Gibson*, 486 F. Supp. 1230, 1240-41 (S.D. Ohio 1980); *United States* v. *Chovanec*, 467 F. Supp. 41, 44-45 (S.D.N.Y. 1979); *United States* v. *Vignola*, 464 F. Supp. 1091, 1096 (E.D. Pa.), aff'd, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1972 (1980); *United*

States v. *Mandel*, 415 F. Supp. 997, 1018-19 (D. Md. 1976); Note, *Civil RICO, supra*, 95 Harv. L. Rev. at 1106-1109; Comment, *Reading the "Enterprise" Element Back into RICO*, supra, 76 N.W.L. Rev. at 100-01 & n. 4; Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action*, 85 Dick. L. Rev. 201, 242-43 (1981); Blakey & Gettings, supra, *Basic Concepts*, 53 Temple L.Q. at 1013 n. 15; Comment, *Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising in its Interpretation*, 27 DePaul L. Rev. 89, 112 (1975).

We recognize that this conclusion may tend to extend the net of the RICO Act to situations which otherwise might find a remedy only in the state courts. In the present context, for example, appellants are able to avail themselves of a federal cause of action for treble damages under RICO where common law fraud is an alternative claim. However, at least some federalization of state claims was not unanticipated by Congress. As the Supreme Court noted in the context of a criminal prosecution:

> *As the hearings and legislative debates reveal, Congress was well aware of the fear that RICO would "move[e] large substantive areas formerly totally within the police power of the State into the Federal realm."* 116 Cong. Rec. 35217 (remarks of Rep. Eckhardt). See also *id.*, at 35205 (remarks of Rep. Mikva); id., at 35213 (comments of the American Civil Liberties Union); Hearings on Organized Crime Control before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 329, 370 (statement of Sheldon H. Eisen on behalf of the Association of the Bar of the City of New York). *In the face of these objections, Congress nonetheless proceeded to enact the measure, knowing that it would alter somewhat the role of the Federal Government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law.*

United States v. *Turkette*, 452 U.S. at 586-87 (emphasis added).

Insofar as the door of the federal courthouse is similarly opened by RICO in a civil context, we are cautioned by the Supreme Court that broad Congressional action should not be restricted by the courts in the name of federalism. *Id.* at 587, 101 S.Ct. at 2531. It is beyond our authority to restrict the reach of the statute. *Id.*; see also Note, Civil RICO, supra, 95 Harv.L. Rev. at 1118-21.

Moreover, in the specific context of this case, it cannot be said that we have opened the floodgates for federal adjudication of every common law fraud claim. RICO is directed only at situations involving an enterprise which engages in or affects interstate commerce. 18 U.S.C. § 1962.[17]

F. Equitable Remedies.

Count II of appellants' complaints requested equitable relief against John Knox Village in the form of reorganization of the Village. Because we affirm the dismissal of Count II as that count now is drawn, we do not reach the difficult question whether, under such facts as may be developed in this case, this equitable relief is available to private plaintiffs pursuant to 18 U.S.C. § 1964 and, if not, whether such relief may be granted under the court's general equitable powers.

We sympathize with the district court's request for guidance on these matters. It would, however, be premature for us to

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[17] In oral argument, the view was expressed that if we recognized appellants' claim as a RICO action, any scheme to defraud executed through two mailings would create a civil RICO claim. This misstates the elements of a RICO offense. Under the facial terms of section 1962, a RICO claim can only be stated where the scheme to defraud involves an enterprise, and where the enterprise is one which "is engaged in, or the activities of which affect" interstate commerce.

The district court here expressly declined to rule on the interstate commerce element of the complaints. The issue is not before us on appeal.

decide these questions not only without a factual record, but also without a pleading which squarely places the issues before us. We note for the information of the parties and the district court such scholarship as we have discovered, without at this time endorsing or rejecting the opinions there expressed. See generally Blakey & Gettings, Basic Concepts, supra, 53 Temple L.Q. at 1014, 1038 nn. 132-33 (indicating equitable relief is available to the private plaintiff).

Because we reverse the dismissal of Count I, and because we suggest that a grant of leave to amend is appropriate as to some material now in Count II, we forego detailed discussion of appellants' allegation that they were wrongfully precluded from filing a curative amendment to their complaints.

The district court's dismissal of Count I and of pendent state claims is reversed. A number of allegations hereinabove identified (nn. 14, 15) are to be struck without prejudice for failure to plead fraud with particularity. The dismissal of Count II as drawn is affirmed, and the case is remanded to the district court for further proceedings in light of this opinion.

APPENDIX C

APPENDIX C

Order Granting Rehearing en banc

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 81-1418 September Term 1982

CLARENCE E. BENNETT, ET AL.,
Appellants,

vs.

KENNETH BERG, ET AL.,
Appellees.

* * *

Appeal from the United States District Court for the Western District of Missouri

DAN R. SANDFORD, JR., ET AL.,
Appellants,

vs.

KENNETH BERG, ET AL.,
Appellees.

Petitions of appellees for rehearing with suggestions for rehearing en banc, having been considered by the Court, are hereby granted.

September 17, 1982

APPENDIX D

APPENDIX D

Opinion of the District Court

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

CLARENCE E. BENNETT, ET AL.,
Plaintiffs,
v.
KENNETH BERG, ET AL.,
Defendants.

Civil Action
No. 80-0381-CV-W-2

AND

DAN R. SANDFORD, JR., ET AL.,
Plaintiffs,
v.
KENNETH BERG, ET AL.,
Defendants.

Civil Action
No. 80-0459-CV-W-2

MEMORANDUM OPINION AND ORDER GRANTING ALL DEFENDANTS' MOTIONS TO DISMISS

The complaints in these two cases are identical except for the named plaintiffs. In the *Sandford* case there are 167 individual plaintiffs and in the *Bennett* case there are 209 individual plaintiffs. However, all the plaintiffs make the same allegations against all of the defendants. All of the plaintiffs are residents of the defendant John Knox Village which owns and operates a retirement community known as "John Knox Village" located in Lees Summit, Missouri. This Village has more than 2500 residents including the plaintiffs. All of the residents have entered into "lifecare" contracts with the defendant John Knox Village under which they paid an initial lump sum for which they received the right to occupy specified housing units in the Village and receive numerous services and benefits for life. In addition to the lump sum payment, they pay a monthly charge,

which apparently from some of the allegations in the complaints can be raised by the Village. There are eight corporate defendants, all but two of which are Missouri not-for-profit corporations. The other two corporations are a Missouri corporation and the Prudential Insurance Company of America, a foreign corporation. There are 22 individual defendants who are alleged to have been officers, directors, or employees of one or more of the corporate defendants, a partnership of three accountants, alleged to have done accounting work and two attorneys alleged to have done legal work for one or more of the corporations.

This 49-page complaint contains 11 counts. Federal jurisdiction of Counts I and II is based on the RICO statute, Title 18, United States Code, § 1961 *et seq.* The complaint contains an allegation that federal jurisdiction of some other counts is based on diversity of citizenship, but there are no allegations concerning this diversity, and, in plaintiffs' briefs in opposition to the motions to dismiss, plaintiffs concede that federal jurisdiction on Counts I and II is based solely on the RICO statute, and that jurisdiction over the remaining nine counts is based on the doctrine of pendent jurisdiction. Therefore, the Court will consider only the motion to dismiss directed to Counts I and II. If these Counts fail to state a claim, the remaining counts will be dismissed for lack of jurisdiction.

All of the defendants have filed motions to dismiss for failure of the complaint to state a claim upon which relief can be granted under Rule 12(b)(6). The Court feels that it would be completely justified in dismissing the complaint under Rule 8(a)(2), which provides that the complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The first two counts of the complaint comprise 44¼ pages of legal size paper. They plead evidence in detail, setting out verbatim copies of documents which could be exhibits at a trial and they are replete with argumentative statements

and color words. The most cursory reading of these first two counts shows a complete violation of the letter and spirit of Rule 8. However, this point has not been raised by the defendants and the Court is not basing this decision on the above remarks.

Section 1962 of Title 18, United States Code, sets forth the actionable activities under the RICO statute. There are no allegations in the complaint of violations of Subsections (a) and (b) of that Section and although not alleged by a plain and simple statement, the Court must assume that this long, rambling discourse must attempt to allege a violation of Subsection (c). There is an allegation of a violation of Subsection (d) (conspiracy to violate (a), (b), or (c)) which will be discussed later.

Subsection (c) of Section 1962, states:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

In their motions to dismiss, some of the defendants raised the question that the complaint does not properly allege and that it is obvious that John Knox Village, a large retirement community in the State of Missouri, is not engaged in, nor does its activities affect, interstate or foreign commerce. It is true that there is no specific allegation in the complaint that "the enterprise" is engaged in or conducts activities which affect interstate commerce. One reason for the omission is that the complaint fails to allege what plaintiffs, in order to state a cause of action, must claim to be an enterprise whose affairs are conducted through a pattern of racketeering activity by the defendants.

This Court considered the interstate commerce question as a serious preliminary question and directed the parties to conduct their initial wave of discovery solely on this issue. This discovery has been completed but the Court has concluded that it is not a

proper question to be determined upon motions to dismiss because it would require examination of a great deal of evidence not in the complaint.

There have been no motions for summary judgment on this issue. During all this discovery and the voluminous briefs filed on this issue, all the parties have assumed that "the enterprise" is John Knox Village, a Missouri not-for-profit corporation.

The most puzzling and unusual part of this complaint is that the plaintiffs allege that they each paid for a life-care contract, but do not allege that this contract is in default or that they are not receiving all of the benefits to which they are entitled under that contract. Reading the lengthy allegations of the complaint, the most that can be inferred is that the plaintiffs claim that through mismanagement of the financial affairs of John Knox Village, the corporation is in an unsound financial condition and that they fear that in the future it will be unable to furnish them these services. They also allege that their monthly service charge has been raised (although there is no allegation that this is in violation of any terms of their contract) because of this unsound financial condition. This raises a serious question as to whether the plaintiffs have any standing to bring a suit under the civil provisions of RICO (Section 1964(c)), which states:

> Any person injured in his business or property by reason of a violation of 1962 of this chapter may sue therefor in any appropriate United States District Court and shall recover threefold the damages he sustains and the costs of suit, including a reasonable attorney fee.

The plaintiffs do make a conclusory allegation to the effect that the monies they paid for their life-care contract constituted a trust fund which has been wrongfully depleted. There are no allegations that the life-care contracts contained any trust provisions or was any more than a contract to furnish life care, which is still being furnished.

The general import of all the allegations is that all the defendants, including John Knox Village, associated themselves in a scheme to defraud. Paragraph 45 states:

> In fact, however, in the minds of defendant Kenneth Berg, various of the other defendants and others associated with them, the Village was little more than a fraudulent vehicle by which they unlawfully enriched themselves in many ways and for the most part secretly. This they did at the expense and to the great damage of plaintiffs and others who had entered into life-care contracts.

Paragraph 57 states:

> By reason of the foregoing facts, as well as other facts alleged below, the creation of the so called non-profit corporation, John Knox Village, was a sham and little more than a means by which defendant Kenneth Berg, CSI, various other defendants and their associates could further defraud the residents and others, and more effectively conceal their fraud.

The Eighth Circuit Court of Appeals in *United States* v. *Anderson*, ... F.2d .... (8th Cir., Aug. 7, 1980) stated:

> The term "enterprise" must signify an association that is substantially different from the acts which form the "pattern of racketeering activity."
>
> • • • •
>
> With subsection (c), an overly broad construction of the term "enterprise" can render that element of the offense interchangeable with the "pattern of racketeering" element.
>
> • • • •
>
> In the case at bar, the Government proved the enterprise element of the offense solely by evidence indicating an association to commit the pattern of racketeering activity. This interpretation of the statute effectively eliminated the enterprise element of the offense.
>
> • • • •
>
> We hold (enterprise) ... to encompass only an association having an ascertainable structure which exists for the

> purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the omission of the predicate acts constituting the "pattern of racketeering activity."

There is no allegation in this complaint of any enterprise which has ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the alleged fraudulent acts and purposes of the defendants and the predicate acts constituting the pattern of racketeering activity. This Court holds that without proper allegation of an enterprise which exists for the purpose of maintaining operations directed toward an economic goal, the complaint fails to state a cause of action because the only liability of the defendants would be for conducting or participating, directly or indirectly in the conduct of such enterprise through a pattern of racketeering activity or collection of unlawful debt.

In paragraph 77, the complaint alleges:

> (a) During the relevant period herein, all of the defendants engaged in an unlawful scheme and common course of conduct which involved among other things:
>
> (1) The unlawful promotion, solicitation, and sale of life-care contracts in an enterprise which was essentially fraudulent:
>
> (2) The making of numerous untrue and misleading statements of material fact, and the failure to disclose material facts relating to life-care contracts;
>
> (3) The unlawful and fraudulent operation of said enterprise.

These broad allegations encompass all of the defendants, including John Knox Village and charged them all with engaging in an unlawful scheme and common course of conduct. In fact Count II of the complaint (against the defendant John Knox Village

solely) alleges that corporation has engaged in a pattern of racketeering activity and violated Subsections (a), (b), (c), and (d) of Section 1962.

In this connection, the only relief sought against John Knox Village in this complaint is the prayer in Count II which prays for a reorganization of that defendant. The interesting question raised by this Count is that the only statutory grounds for this relief is found in Section 1964(a) of the Act which states that the district court shall have jurisdiction to prevent and restrain violations of Section 1962 by ordering dissolution or reorganization of any enterprise. Subsection (b) provides that "the Attorney General may institute proceedings under this Section."

Subsection (c) provides that: "any person injured in his business or property by reason of a violation of Section 1962" may sue in district court and recover treble damages including a reasonable attorney fee. Defendants argue that Count II states no claim against the defendant John Knox Village because only the Attorney General can institute proceedings under Subsection (a) and individual plaintiffs are limited to relief under Subsection (c). The Court can find no precedent on this question. But, in order to secure guidance, in the event of an appeal, rules that individual plaintiffs such as these can only seek relief under Subsection (c), because if Congress had intended that they could bring an action under Subsection (a), Subsection (c) would have definitely stated this fact. This ruling by this Court standing alone would sustain the defendants' motion to dismiss Count II of the complaint.

There are numerous allegations in this complaint that all of the defendants have associated themselves in a scheme to unlawfully loot the assets of John Knox Village, a part of which assets, it is alleged, consisted of payments for life-care contracts by these plaintiffs. None of those numerous allegations constitute "a pattern of racketeering activity." If these plaintiffs have any standing to bring a suit based on these allegations, it would

obviously have to be a derivative action for restoration of the looted assets to John Knox Village and would be a state court action. In addition to the numerous allegations of mismanagement and waste of these assets, the complaint contains a general allegation that John Knox Village has been insolvent since its inception and was fraudulently represented to all purchasers of life-care contracts as being in sound financial condition. The complaint does allege that "in the furtherance of the aforesaid unlawful scheme and course of conduct, the defendants used, and caused to be used, mail delivered by the United States Postal Service on numerous occasions, right up to the present date, in violation of 18 U.S.C. Section 1341" and similar allegation of violation of the wire fraud statute, 18 U.S.C. Section 1343. These are the only possible allegations in this lengthy complaint of a pattern of racketeering activity.

Broadly construed, the above allegations could be said to allege a scheme to defraud the plaintiffs in the sale and purchase of life-care contracts (and that the mail and telephone were used in furtherance of the scheme). But, each and every defendant is alleged to have committed these predicate acts which constitute a pattern of racketeering activity.

The allegation that all the defendants conspired to violate the provisions of Subsections (a), (b), or (c) of Section 1962 must fail as explained in *United States* v. *Anderson*, *supra*, since it cannot supply the necessary definition of an enterprise, the affairs of which were conducted by the defendants through a pattern of racketeering activity. Since this complaint alleges that all of the defendants have associated themselves to commit a pattern of racketeering activity and there is no allegation of any enterprise which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate actions constituting the pattern of racketeering activity, it is the Court's decision that Counts I and II of this complaint fail to state a claim upon which relief can be granted under the RICO statute

upon which this Court's jurisdiction is based. Jurisdiction of the remaining counts, being based solely on the doctrine of pendent jurisdiction, does not exist in this Court after Counts I and II are dismissed and they are therefore dismissed. *See, United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966).

It is therefore

ORDERED that the motions of all the defendants to dismiss the complaints in each of these cases for failure to state a claim upon which relief can be granted are hereby granted and the complaints in both actions are hereby dismissed.

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WILLIAM R. COLLINSON
Senior United States
District Judge

Springfield, Missouri
March 19, 1981

APPENDIX E

APPENDIX E
List of Plaintiffs

The plaintiffs in *Bennett* v. *Berg* are the following individuals: Clarence E. Bennett, J. Maurice Hoare, Alpha K. Hitchcock, Leona Miller, Joseph B. Butler, Earl L. Vance, Ruth G. McKinley, Hazel L. Aurand, Mayol H. Linscott, M. E. Willmott, Evelyn Thomas, Pat Tawson, Robert T. Bruce, Esther Lamb, Ethel Botzum, Velma P. Davison, C. H. Bull, Edna M. Phillips, Arthur W. Phillips, Bernice Weadock, Dorothy Maughermar, Paul Maughermar, Brook L. Haines, Rowena M. Haines, Jack R. Adams, Thelma G. Adams, Opal T. Werner, Tom A. Smith, Aileen H. Smith, Marguerite Bradley, Charles S. Barger, Gala Sampliner, Frances Kimsey, George E. Sanders, Laura Volberding, Flora H. Vance, Fred D. Pitt, Ruth Pitt, Susan M. Linscott, Jack Tillotson, Elizabeth Thomson, Carmen Leininger, Champ O'Donnell, Cornelia O'Donnell, Willetta Todd, Howard D. Smethers, Marie Miller, Roy L. Stephens, Ruby A. Stephens, W. P. Humston, Eleanor Humston, Milton W. Dunn, Leonette Kincaid, Paul G. Martin, Russell Lovell, S. G. Humphrey, Ethel Perkins, Fred E. Wilbur, Mildred Wilbur, Theo J. Bonsall, Mabel H. Ochtman, Paul E. Pippitt, Uel Sisk, Marian E. Pitrat, Jim Kimsey, Caroline A. Sanders, Ruth Volberding, C. L. Treadway, Irene L. Treadway, Mildred M. Burton, Robert E. Burton, Dora Tillotson, Edith H. Stenson, Harold H. Fichtner, Leah Fichtner, Nancy H. Reid, Josephine Merl, Nellie Kibbey, Catherine C. Kent, W. C. Gossedge, Margaret S. Abbey, W. Edward Johnson, Harlan G. Refvem, Eugene Herrbach, Margaret Herrbach, Dorothy Humphrey, Helen E. Butler, Claude Lewis, Harold L. Stout, Winifred Stout, Margaret E. Grimes, Marie J. Wilson, Helen M. Wilkerson, Warren L. Wilkerson, Juanita Sisk, Betty Foley, Leo Zeek, R. R. Sullivan, Dorothy W. Henderson, Ruth Black, Ruth Freund, Agnes Angel, Frances Merz, Marguerite Duston, Ovid Duston, Lila J. Keegan, Edith P. Dobbins, Lucille Hodge, Gertrude Boss, Janet Fleischman,

Don L. Berger, Adele Kuchenbuch, James T. Argenbright, Frances L. Argenbright, Otto W. Knutson, Thelma J. Grammer, Irene C. Burns, Helene M. Brink, Virginia R. Allen, Derrill Costley, Dorothy Costley, Ingeborg Carlson, Velma M. Copeland, Mary Wallace, Betty Krebs, Ita C. Daugherty, Edith H. Stenson, Richard R. Manifold, O. M. Johnson, Florence Johnson, Glenn Miller, Nellie Miller, Max Sheldon, Reta Sheldon, William H. Perkins, Mabel E. Wayne, Lois Morrison, Mervin M. Morrison, James A. Weber, Stewart F. Hovey, Dail Adkins, C. G. Zimmerman, Armin Witthar, Pauline Blosser, Phyllis R. Snead, Mildred C. Burke, Margaret Fowler, Marian D. Vaughan, Barbara Swinney, C. Mildred Johnston, Everett O. Johnston, Nora M. Witthar, Freda E. Fraas, Viola M. Combs, Myra Gregg, Bernice Raines, Elizabeth Barter, Murel C. Kemph, Evelyn F. Kemph, Hilda Graham, Louise M. Hamilton, Edith Talbot, Harry H. Simpson, Thomas E. Pendleton, Nadean L. Pendleton, O. W. Hughes, Viola R. Farris, Nadine Hodges, Arthur W. Talbot, Dr. R. A. French, Louise O. Carpenter, Ralph Heinman, Grace Heinman, Pauline Creten, Grace A. Wahlstedt, Marie Morris, Frances Heft, Helen Billow, Helen K. Blackburn, Helen Staats, Mary Ellen Simpson, Elizabeth M. Greene, Maude Brown, Marie Tompson, Anna Henger, Eleanor Heitland, Allene McKenna, Roberta I. Cox, Susan Wade, Bertha Needham, Eva H. Evans, Esther Morse, Gladys Rosenkrantz, Edith Vespestad, and Mrs. Clay C. Rogers.

The plaintiffs in *Sandford* v. *Berg* are the following individuals: Dan R. Sandford, Jr., Aline E. Sandford, Faye Akright, Elizabeth Anstey, Mildred B. Baker, Ralph E. Baker, Florence M. Baker, Irene H. Barger, Franziska Bartsch, Otto W. Beaman, Ruth L. Beaman, Mary B. Beazley, Arthur H. Birk, Frances B. Birk, Lucille G. Brackman, E. C. Brown, Lelia M. Brown, Edna C. Burch, Helen L. Burrus, Jesse L. Campbell, Marie M. Campbell, Revilla Campbell, Lena Carter, Emma Cartmell, Lloyd T. Christie, Harriet H. Christie, Flo L. Church,

Dorothy Conway, Almon B. Coover, Dorothy E. Dale, John P. Dallam, Ann Dallam, Edwin C. Davis, Grace K. Davis, Chester L. Davison, Ralph G. Dick, Robert Dunbar, Ralph E. Durham, Geraldine L. Ellis, Mary Ann Flippo, Alta Flottman, Dorothy W. French, John T. Gascich, Victorine A. Gascich, Hazel E. Gossadge, Katherina E. Guinn, Emily F. Gunther, George M. Haller, Edna Haller, Beatrice Hamilton, Hazel Hanson, John C. Harris, Sarah B. Harris, M. Eugenia Haydon, Elizabeth Heinz, Ralph Henger, Elizabeth L. Hilburn, Mitzi K. Hiller, Catherine L. Hoeft, Russell R. Howell, Elizabeth Howell, Kate Hull, Ilene Jacques, Dortha Jenkins, Lucille H. Jenkins, Mary M. Johnson, Gearl King, Michael D. Konomos, Edna M. Konomos, Kathryn D. Kules, Opal J. Laird, Phillip Lamb, Elbert W. Landfried, Elina Landfried, Theressa Lappine, Anna M. Lenz, Irma Lile, Helen Link, Edward J. Mantel, Bernice J. Mantel, Raymond A. Mattson, Bessie Merle Mattson, Sara E. McCann, Louise McCoy, Frances McCune, Ruth E. McIntosh, Annabell W. Merrell, Alfred E. Michael, Frederic N. Miller, Frances Mollenkamp, Maud E. Moore, Maude E. Morris, Hazel R. Musick, Arthur J. Nelson, Jr., Mable T. Nelson, Patrick H. Nugent, Harriette H. Nugent, Vernon A. Patton, Marvin A. Pegram, Mildred E. Pegram, Mildred W. Pippitt, Marion E. Poe, Ethel Refvem, Gertrude Pollom, Marie E. Pryor, Loretto L. Rabinovitz, Helene A. Reckards, Elsie Reinicke, Selma B. Reinicke, Algin O. Richardson, C. S. Robinson, Geraldine Robinson, Eber Roush, Record S. Rowland, Helen L. Rowland, Georgia Saunders, Virginia L. Self, Wayne Shadowen, Alice Shadowen, Elsie T. Shields, Dorothy L. Shumate, Marjorie Smethers, Estelle Smiley, Martha Smiley, Edwin S. Smith, Erma Smith, Nicholas G. Smoley, Ona N. Smoley, John F. Stemmerman, Hortense C. Stemmerman, Floyd J. Stover, Rachel Stutzman, Gladys M. Sullivan, Esther Swanson, Mildred R. Swenson, Nadine D. Tawson, Dollie M. Taylor, Sara Taylor, Ora A. Thee, Olive I. Thomas, Henrietta Thorp, Ruth Triplett, Ermalee Trost, H. D. Tucker, William B. Turnbow, Elmer R. Turner,

Herschel H. Varney, Enid L. Walker, Lillian Ward, Lilyan G. Warner, Henry P. Wetmore, Marion W. Wetmore, Lee L. Wharton, Maxime A. Wharton, Irma V. White, Jessie M. Whitmore, Ethel H. Williams, Richard N. Windsor, Mary B. Wineland, Belle Worlow, Evelyn M. Worley, Dilbert L. Yeagley, Mary K. Yeagley, Belle Zimmerman, Boyd R. Zuber, Marke C. Zuber, and Edna Houston.